No. 20,641

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA
and BAKER AIRCRAFT SALES, INC.,
Defendants-Appellants,

vs.

BETTY K. FURUMIZO,
Plaintiff-Appellee and Cross-Appellant.

BRIEF ON BEHALF OF APPELLANT BAKER AIRCRAFT SALES, INC.

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JURISDICTION

The jurisdiction of the District Court was based upon Title 28 United States Code Section 1332, 1346 (b) and 2671 et seq. The jurisdiction of this Court rests on Title 28 United States Code Section 1291. Judgment was entered June 22, 1965 (R. 614).[1]

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[1]All references to pages in this brief will be according to the pages appearing in the transcript of record on appeal dated December 27, 1965, and signed by William F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, since counsel has no means of ascertaining whether or not a different paging was used by the Clerk of the Court of Appeals, references to evidence will be on the basis of transcript paging since there is not available to counsel in Honolulu the record paging of the transcript of evidence.

Motions for new trial were timely filed (R. 628-633) and on October 1, 1965, an order was entered denying the motions for new trial (R. 693). Notice of appeal was filed by appellant Baker Aircraft Sales, Inc., on November 29, 1965 (R. 706-7).

STATEMENT OF THE CASE

This action was brought in the Court below by Betty K. Furumizo, the appellee, in three capacities: personally, as guardian ad litem for her minor daughter, and as administratrix of her deceased husband Robert Takeo Furumizo (amended complaint and summons, R. 12-16) seeking to recover damages for the death of her husband, the father of her minor child in question. Claims for death by wrongful act are governed by Section 246-2, Revised Laws of Hawaii, 1955.

The basic facts pertaining to the accident itself are set out in great detail in the decision below (R. 544-613). They are basically undisputed. On June 19, 1961, shortly before 7:00 p.m., Honolulu time, the decedent, Robert Takeo Furumizo was in an aircraft, Piper PA-18 Super Cub 95, owned by the defendant Baker Aircraft Sales, Inc. He was receiving dual instruction at and around Honolulu International Airport from an instructor of the defendant Baker Aircraft Sales, Inc., Charles Isamu Shima. The Piper was shooting a series of touch and go landings on runway 4 left, which intersects runway 8, which is used for jet takeoffs. The tower transmissions which

are in evidence and which were numbered during the course of trial show the following transmissions which are of significance here:

14. Piper 99 Zulu continue approach now for 4 left. DC-3 right base the other runway.

19. Piper 99 Zulu make this a full stop, hold short of 8 if possible.

28. Piper 99 Zulu, pull ahead slightly, allow the DC-3 to pass behind you.

30. Japan Air 8005 wind of north north-east 6, cleared for takeoff.

32. Japan Air 8006 cleared for takeoff.

37. Piper 99 Zulu, hold your position.

43. Air Force 6338, caution, turbulence departing DC-8 cleared for takeoff.

44. Piper 99 Zulu, caution turbulence departing DC-8 cleared for takeoff.

At the point that this transmission was given, the Piper Cub was on runway 4 left, approximately 1,000 feet from the intersection of 4 left and runway 8 and the DC-8 had just crossed that intersection. The Piper Cub commenced its landing role and took off and made a normal climb to a height of about 75 feet when it reached the intersection, rolled to the right, crashed on its right wing and burst into flames. Both the occupants were killed.

As is noted in the pre-trial order (R. 371-380):

"11. At the time of the accident the Decedent had received a total of 10 hours and 45 minutes of dual instruction over a period of the imme-

diate past 2 months, but had not yet soloed. Decedent held an FAA Student's Pilot License and a current Second-class Medical Certificate.

12. At the time of the accident the weather report taken at 18:55 HST (6:55 p.m.) was: estimated scattered clouds at 3,000 feet, visibility over 15 miles, temperature 78 degrees, dew point 66 degrees, wind 6 knots from the east northeast. Sunset on that date was at 19:16 HST (7:16 p.m.) or within 2 minutes of that time.

13. The existence of the potential hazards of turbulent wake of large aircraft to smaller aircraft was a matter of 'common knowledge' in the flying industry at the time of the accident."

The trial court found that the accident was the result of the small light Piper Cub encountering turbulence originating with the wing-tip vortices of the DC-8 of such nature that it was impossible to control the Cub, and of such violence as to cause the crash. This finding is not disputed by appellant Baker.

As noted in paragraph 15 of the pre-trial order (R. 371, et seq.):

> "At the time of his death the Decedent was a GS-7 Step 2, earning $5,520 per annum plus 17½% cost of living allowance as an electronics technician with the FAA (subject to relevance)."

Plaintiff's theory of the case with respect to appellant Baker is set forth as follows in the pre-trial order (R. 371, et seq.):

> "Plaintiffs further contend that under 28 U.S.C. § 1332 as citizens of the State of Hawaii,

> they have a claim in an amount exceeding, exclusive of interest and costs, the sum of $10,000, against the Defendant BAKER as a California corporation with its principal place of business in California, for the negligence of its employee CHARLES ISAMU SHIMA (hereinafter referred to as "SHIMA") while acting within the scope of his employment, as pilot in command of the aircraft in which he was giving dual instruction for hire to the Decedent as a student pilot, in taking off or allowing the Decedent to take off directly into the jet wash of the DC-8 aforesaid in spite of his knowledge as well as a specific warning given to him of the hazard involved and in failing thereafter to maintain safe control of the aircraft under the circumstances, thereby causing the aircraft to crash, resulting in the death of the Decedent and damages to the Plaintiffs as hereinafter more fully set forth."

As noted in the pre-trial order, appellant Baker denied the allegations of negligence and set up the defenses of contributory negligence and assumption of risk on the part of decedent. On the issues as framed the case was tried.

The evidence revealed, as the pre-trial order had set forth, that decedent at the time of his death, was an employee of the Federal Aviation Administration, with the rating of GS-7, Step 2, earning a base of $5,520 per annum, plus a 17½% cost of living allowance. Over objection, the witness Olsen was allowed to give his opinion that the decedent would have been promoted to GS-9 in September of 1963 (Tr. 1688) although he had admitted that there was a basic

assumption involved to wit that Mr. Furumizo would have gone to the Oklahoma City Academy of the FAA and would have passed his exam (Tr. 1681), and although he had stated in this respect that while he could make a conclusion that the validity thereof may or may not be highly questionable (Tr. 1677) and that he could not say whether or not Mr. Furumizo would pass the course (Tr. 1672 and 1674). As to a promotion from grade GS-9 to grade GS-11, the witness stated that in his division which was the one in which Mr. Furumizo worked, there had been no promotions from GS-9 to GS-11 in the three years which had passed since Mr. Furumizo's death (Tr. 1691) and that in order to give an answer on the question of whether or not Furumizo would be promoted from GS-9 to GS-11 he would have to make a number of assumptions which are listed in transcript on page 1694. He did not give his opinion on this subject because, as counsel and the Court conceded that there were too many assumptions involved (Tr. 1695). Over objection, the witness Wong was allowed to testify that, in his opinion, Furumizo had the capacity for an eventual promotion from GS-9 to GS-11 (Tr. 1761, 1762, 1763). His statement was "my opinion is that he would have achieved that level eventually". However, on cross-examination, it was revealed that the witness's opinion was based on an assumption of a transfer by Furumizo from installation, the organization over which Mr. Olsen had charge, to maintenance, the organization in which Mr. Wong worked (Tr. 1776 and 1782), and further that transfers from one to the other were limited by vacancies (Tr. 1783).

In the course of the trial the Government produced as a witness Emmet James Kay, Senior, a former chief flight instructor with defendant Baker Aircraft Sales. He testified that he had given Mr. Furumizo his first four or five hours of flight instruction (Tr. 568) and in the course of his instruction had instructed him on the subject of wake turbulence (Tr. 568, 569, 571, 572, 580). He also testified as to the information on the subject of wing-tip vortices which was available on the pilot's bulletin board at Baker Aircraft Sales, Inc. during the time that Mr. Furumizo was receiving his instructions (Tr. 596, 597) and that he had instructed Furumizo to read this literature (Tr. 597). He further stated that Furumizo appeared to grasp and understand the instructions which were given to him (Tr. 632).

Based on his experience as a flight instructor and as chief instructor for Hawaiian Aircraft Sales, the name under which defendant Baker did business, he stated that a student with the hours which Mr. Furumizo had at the time of the accident would normally be handling the radio in the aircraft, that the student would acknowledge the radio transmission and be the one who would make the decision to take off or not take off (Tr. 640-643). As Exhibit G8 reflects, Mr. Furumizo was first instructed by Mr. Kay and then for the last five hours or so of his training prior to the accident, by Mr. Shima, who died in the accident with him. Mr. Kay had known Mr. Shima since he was about fourteen years old (Tr. 568), he had trained Mr. Shima and was completely satisfied with

his flying ability (Tr. 592). Mr. Shima was aware of the subject of wake turbulence because he was licensed by the FAA and an oral examination is given for license as an instructor and that examination contains questions on wake turbulence (Tr. 600), therefore, to the best of the witness's knowledge, Shima had knowledge of the dangers of wake turbulence (Tr. 626). Mr. Kay stated that a student pilot, even though he had an instructor with him had perfect liberty to refuse to go when a clearance was issued (Tr. 633-634).

Mr. Carter, the then manager of defendant Baker stated that at the stage of instruction which Mr. Furumizo had reached, he would be the one actually shooting the takeoffs and landings unassisted (Tr. 816). The instructor, of course, would be following through with his hands near the controls (Tr. 816). When the plane crashed it immediately burned (Tr. 979). After the fire, Furumizo's right arm was in front of his face as if he was anticipating something, and Shima apparently had let his safety belt go and was in position to back out the door, even though the door would not open due to the fact that the plane had crashed on its right side (Tr. 800, 801). The Court in its ruling, page 14 of the decision, paragraph 35, stated:

> ". . . None of these impressed the Court in the light of all the evidence, as indicating any negligence on the part of Shima or Furumizo in the actual operation of the Piper, other than *the possibility of negligence* in taking off when the Piper did.

36. The Court's ultimate ruling in this case may be summed up thus: Baker had the duty, equal to the highest duty a commercial airline owes to its passengers, of care in furnishing instruction to Furumizo, the student pilot who had not yet soloed. Shima, the instructor pilot, although apparently otherwise well qualified, quite evidently had not sufficiently absorbed the dangers of vortex turbulence from large planes, such as the DC-8, to tiny planes like the Piper to realize that by taking off from a point as close to the intersection as it was, and crossing runway 8 at an angle of only 40 degrees, with a crosswind of the type shown, he would be almost certain to encounter such turbulence at its maximum degree of danger. Therefore Baker was negligent in not having furnished an instructor who was so fully aware of such dangers that he would have avoided taking off when and under the circumstances he did.

37. Furumizo was not negligent in any manner in this respect, since his instructor was in charge of the plane, and at takeoff especially would be the one to exercise judgment in accepting clearance from the tower.

38. This negligence of Baker, since it antedated the actual takeoff of the Piper, was not the sole and last independent cause of the accident, but continued as a contributing cause from before the accident until it happened. Had Shima been an adequately trained pilot, and had he been adequately instructed and made fully aware of the dangers of alrge plane wake turbulence to small planes, the Court cannot believe that he would have taken off at the time and under the circum-

stances he did, the evidence indicating that he was a careful and prudent person, not one given to taking undue chances. . . ."

Again in finding 42, the Court alludes to:

". . . the negligence of the defendant Baker in not furnishing in Shima an adequately informed and trained pilot, . . ."

And in paragraph 55 the Court stated:

". . . As this Court has held, the basic negligence on the part of defendant Baker was in failing to furnish to Furumizo, to whom it owed the highest degree of care, an adequately trained and informed instructor pilot having a full realization of the extent of the danger to planes of the size of the Piper, of turbulence in situations where such small plane would cross at an acute angle an intersecting runway on which the turbulence had been created, almost immediately after the turbulence was created."

And again in paragraph 68 at page 54 of the decision, the Court says:

". .. While this does not excuse Baker, whose duty was of the highest to furnish to Furumizo an instructor pilot who so well knew of the imminent hazards of such a takeoff that he would have held back until the turbulence could be reasonably assumed to have safely subsided . . ."

Having concluded that both Baker and the Government were negligent and liable, the Court turned to the issue of damages. On the loss of future wages, it used as a basis the figures and calculations submit-

ted by defendant Baker in its Exhibit B6, and reached an ultimate conclusion that the value as of June 20, 1965, of the net lost wages to that date, plus the future lost wages, would be $126,216.46. In calculating this amount, the Court assumed a promotion to GS-9 in September of 1963, and a promotion to GS-11 ten years thereafter. The Court awarded $50,000 to the widow for the loss of the care, comfort, society and companionship of her husband, $30,000 to the daughter for the same loss with respect to her father, $15,000 to the estate for the pain and suffering of the decedent in the accident, and $363.93 as the cost of funeral expenses over and above a government allowance.

The trial ended on April 14, 1964 (Tr. 2071). The decision was rendered June 21, 1965. Thereafter, the plaintiff filed a motion to amend the complaint to add the theory of a failure to furnish an adequately informed and trained instructor pilot on the ground that this had been tried at the case and that the amendment should therefore be allowed (R. 624-627). Both of the defendants filed motions for a new trial (R. 628-633). No motion was made to amend the pre-trial order.

The Court, over objection, granted the motion to amend the complaint by order entered September 3, 1965 (R. 648-649). At the hearing on the motion for new trial, counsel vigorously pointed out the fact that the theory of the amended complaint on which the Court had ruled against defendant Baker, that is, that there was a failure to furnish an adequately

trained instructor, was not an issue in the pre-trial order, and had not in fact been alluded to in the oral ruling of the Court at the close of the trial on the issue of negligence, and that the defendant had had no opportunity to produce evidence on that subject (Tr. of October 1, hearing, page 6, et seq.). The Court overruled this as well as the suggestion that the matter be opened for the taking of further evidence (Tr. 19 and 20). On October 1, 1965, the Court entered its order denying the motions for new trial and the appeal follows.

QUESTIONS PRESENTED

1. Should the Court below, fourteen months after the trial, have held against appellant Baker upon a theory of negligence which was not presented in the pre-trial order, nor in fact tried at the trial?

2. Should the Court below have refused to allow the matter of evidence to be reopened for the purpose of putting in evidence of custom and practice among the flying schools with respect to the training of instructors with respect to wake turbulence?

3. Was there evidence upon which appellant Baker could be held negligent and the decedent absolved of contributory negligence?

4. Was the judgment below erroneous and excessive?

SPECIFICATIONS OF ERROR

1. The District Court erred in failing to dismiss the action as to Baker Aircraft Sales, Inc., for failure to show negligence on the part of said defendant-appellant or its employees.

2. The District Court erred in finding said defendant-appellant negligent in failing to provide adequate training for its employee instructor Shima, when such issue was not raised in the pleadings of the pre-trial order.

3. The District Court erred in permitting an amendment of the complaint after trial and decision to allege that the defendant-appellant was negligent in not providing proper training for its instructor employee Shima, and the Court further erred in refusing to permit said defendant-appellant a hearing thereon thus violating the due process clause of the United States Constitution.

4. The District Court erred in failing to follow the Hawaii Rule that there can be no negligence proved where a plane crashes and both pilots are killed, in the absence of some evidence as to who was at the controls and who made the crucial decision to take off in the instant case.

5. The District Court erred in holding defendant-appellant Baker liable.

6. The District Court erred in holding that there was no evidence that the decedent Furumizo was guilty of contributory negligence or assumed the risk of his injury.

7. The District Court erred in entering an excessive judgment on the evidence in the case.

8. The District Court erred in failing to follow the Hawaiian Rule that damages for loss of future earnings must be proved with certainty and cannot be speculative.

SUMMARY OF ARGUMENT

In this case, the aircraft which crashed began its takeoff roll at a point a thousand feet from the intersection of two runways when a very large jet had just taken off on the intersecting runway. The situation was such that there was imminent danger to the aircraft at the intersection from the wing-tip vortices of the department jet. There is no direct evidence as to who handled the communications with the tower, made the decision to take off, or actually flew the airplane. Evidence of custom and practice indicates that in such a situation the student pilot would handle the communications, make the decision, and actually fly the aircraft, although he would be monitored and followed through by the instructor pilot. Both the instructor and the student had knowledge of, and had been instructed in, as to the dangers of wake turbulence caused by wing-tip vortices of jet aircraft. In such a situation, where both of the pilots have died, what actually happened in the airplane cannot be proved, and under Hawaiian law, since neither negligence nor contributory negligence can be proved

in the circumstances, no verdict against the defendant-appellant can be rendered. Assuming that this rule can be disregarded, then it follows that the decedent, having been instructed in the matter of wake turbulence and being in all probability the one who made the decision to take off and the one who was handling the controls, was guilty of contributory negligence or assumed the risk of his injury.

The plaintiff's theory as set forth in the pre-trial order was that the defendant was negligent in that its instructor was negligent in taking off, or allowing the decedent to take off "in spite of his knowledge as well as a specific warning given to him of the hazard involved and in failing thereafter to maintain safe control of the aircraft under the circumstances". The Court below, however, expressly held defendant-appellant Baker liable upon a different theory, to wit that it had supplied an improperly trained instructor pilot.

There was no evidence to support this finding other than the evidence of the fact that the takeoff itself was made, since all of the evidence as to the training of the instructor pilot indicated that he had been instructed and did know of the dangers of wake turbulence. Moreover, such evidence was extremely scanty for the reason that it was not an issue in the case. Since the instructor pilot was also the person who instructed Furumizo, such evidence was relevant to show how much information he would have been able to pass on to the decedent student, and was therefore unobjectionable but the issue of the scope of his

instruction and the standards with respect thereto in the trade was not pleaded or tried. It was not argued. It was injected into the case by the Court *sua sponte,* fourteen months later.

The Court below permitted an amendment of the complaint after decision, even though the decision followed the trial by fourteen months. The Court below did not amend the pre-trial order, did not make the finding that there was manifest injustice in holding the plaintiff to the theory upon which the case had been tried, and refused to permit the reopening of the testimony to adduce evidence as to standards in the trade, which evidence was, of course, available and relevant. In so doing the Court below deprived the defendant-appellant of its day in court upon the very theory upon which it held it liable, and thus violated the Constitution of the United States.

Although the Hawaiian Rule is that there must be evidence with reasonable certainty of the loss of future earnings, the Court below in calculating the amount of lost wages gave the decedent two promotions, neither of which by the testimony were reasonably certain, and both of which depended upon assumptions of facts which could not be established at the time. Moreover, the Court below acted inconsistently in the application of its discounts and contrary to the evidence with respect to the deduction for the decedent's personal expenses.

Finally, the Court below awarded an excessive amount with respect to the pain and suffering of the decedent in the light of the evidence.

ARGUMENT

I. THE COURT BELOW ERRED IN HOLDING DEFENDANT BAKER LIABLE (Specifications 1 through 6).

This is a case in which the airplane in question contained two persons, the decedent Furumizo and the decedent instructor Shima. According to the evidence both had knowledge of and had been instructed with respect to the dangers of wake turbulence created by large aircraft. Moreover, since the decedent Furumizo was an employee of the FAA, knowledge of the matter on his part was conceded by the pre-trial order (R. 371-380). There is no evidence as to who communicated with the tower, who made the decision to take off and who actually flew the airplane, since both the occupants are dead. There is evidence that at the particular stage of training which the decedent Furumizo had reached, he would under normal custom and practice have been the person to handle the communications with the tower, make the decision to take off and fly the plane (Tr. 642, 643). Shima was of course a licensed instructor pilot employed by defendant-appellant Baker (Tr. 590, 592, 600). Furumizo had a student pilot's license (Exhibit P 13). Since both of the occupants of the plane died there is simply no evidence as who did what and while Shima was an instructor pilot and Furumizo an unsoloed student pilot, the evidence does indicate that Furumizo had had instruction in wake turbulence (Tr. 568-569, 571-572, 580) and that he normally would have been the one who handled the communications, made the decision to take off, and flew the airplane (Tr. 640-643).

There is no case on this point which has been passed upon by the Supreme Court of Hawaii, however, in an unreported oral ruling in *Haddon v. Atkinson,* Civil 1023 in the Circuit Court of the Third Circuit of the State of Hawaii, a directed verdict on both the claim and counterclaim was granted by the Court of the Third Circuit in a situation where there were two persons in the airplane at the time of the crash and both were killed. The plane was in instrument weather conditions and only one of the two pilots had an instrument rating. Nevertheless, the Court directed a verdict against the claims by the estates of both pilots.

The cases from other jurisdictions on the subject are badly split and there can even be cases found in which courts have directed verdicts although the action was brought by a person who was a mere passenger, *Hall v. Payne,* 189 Va. 140, 52 S.E.2d 76 (1949).

See also:

In re Rivers Estate, 175 Kan. 809, 267 P.2d 506 (1958);

In re Hayden Estate, 174 Kan. 140, 254 P.2d 813 (1953).

Whatever may be the law in other jurisdictions, the law in Hawaii is established by the Third Circuit case in the cited and reported decision. The Federal courts are as much bound by the decisions of State lower courts where there is no decision by the Court of Appellate Jurisdiction in the State as they are by the decisions of the State Appellate Courts where there are such decisions, *Lembcke v. United States,*

181 F.2d 703 (2d Cir. 1950); *West v. American Telephone and Telegraph Company,* 311 U.S. 223 (1940).

The logic behind the rule that prohibits speculation as to who was actually flying the airplane and who made the crucial decision to take off is forcefully illustrated by the facts in this case. Here, both pilots had been instructed on wake turbulence. In all probability, although it cannot be known or shown, Shima having more experience also had more knowledge, but who it was that communicated with the tower, received the warning, made the decision to take off and flew the airplane we cannot know. We cannot know how Shima viewed the danger, we cannot know how Furumizo viewed the danger, all that can be done is speculate, and that is precisely what should not be done. Of course, it will be argued that Shima, being the licensed instructor is "responsible" for the aircraft. This scarcely supplies the missing facts. An analogy will demonstrate why. Let us suppose that an automobile equipped with dual controls and containing a licensed instructor driver and a licensed student driver approaching a red light suddenly accelerates into the path of a vehicle on an intersecting street and both instructor and student are killed. Who can say which of the two was the actor causing the fatal acceleration. In other words, in a situation such as this, is the aircraft training school the insurer of the student's safety? If so, when does the student's knowledge rise to the point where the rule no longer applies? Had Furumizo never been instructed on turbulence, then because Shima had, there would be

evidence on which a finding could be predicated. Here, both had been instructed but the amount of instruction Furumizo had received and how much he had absorbed cannot be known because Shima and he are both dead. Evidently he was nearing the time for solo when he presumably would be sufficiently instructed as to deal with such situations with no instructor aboard. How then can the evidence in the record convict Shima and acquit Furumizo of negligence or assumption of risk.

Probably it was in order to avoid this dilemma that the Court below held that appellant Baker was negligent in furnishing an improperly trained instructor in Shima. Yet the only evidence is that Shima was a competent pilot who was properly instructed as to wake turbulence (Tr. 590, 592, 600, 626).

There is no evidence other than the fact that the airplane took off which would indicate that he would not know of the dangers of wake turbulence, but there is more to the issue than that. In this case a pre-trial order was entered. Plaintiff's theory was set forth. That theory was not that Shima was improperly trained, but that Shima, although knowing of the dangers, negligently took off. The evidence with respect to Shima's training *was of course relevant on the subject of plaintiff's assertion that he knew the danger* and it was also relevant since he was Furumizo's instructor on the subject of how much instruction Furumizo would or should have received on the subject of wake turbulence. There was no assertion at any point during the trial that the negli-

gence theory being pursued by the plaintiff was that appellant Baker had negligently furnished an improperly trained instructor. The arguments made at the close of the trial on liability which are reported in the transcript on pages 1457 through 1638 do not disclose that this was the theory being pursued by the plaintiff, on the contrary, as plaintiff's counsel stated:

> "With respect to the facts of judgment—pertaining to the judgment and knowledge of Mr. Shima, *he was aware of the potential hazard of turbulent wake* of large aircraft to smaller aircraft. By a stipulation, this was a matter of common knowledge in the flying industry at the time." (Tr. 1464, 1465) (Italics supplied)

Again:

> "Now, as to the knowledge of Shima, Mr. Jones stated that if you know there is turbulence you just don't take off. And this, as I said earlier, was communicated directly to him in the clearance. So, regardless of his degree of knowledge, if any, he was responsible to know, as an instructor, and in view of the agreed fact that it was common knowledge in the industry, particularly." (Tr. 1466)

And again, he said further that to the best of his knowledge, Shima was aware of the wake turbulence hazard.

> "Both Mr. Kay and Mr. Carter indicated that all current publications, such as plaintiff's Exhibit 15, the Aviation Safety Release 399, were available to him, and he should have been aware of them, whether he was or not; that he was re-

sponsible to read them and to be aware of their contents." (Tr. 1466-1467)

"So the conclusion as to Instructor Shima is that he either knew or should have known of the hazard which caused the accident, and therefore was negligent in doing nothing about it." (Tr. 1467)

Counsel for the appellant Baker stated during oral argument:

"Mr. Crumpacker's essential claim, as I understand it correctly, is that the alleged negligence of Baker Aircraft consisted in a decision which he said that Mr. Shima made to proceed when he received that clearance." (Tr. 1509)

And again:

"His claim is that the act was the negligent taking off of the aircraft, which he says is negligent; therefore, you must imply that the pilot did it. But I say this is exactly like all of the other cases. There are two people in that aircraft; and by the great weight of authority, there is no evidence to show who made the determination to go, and who actually controlled the plane, except for the evidence which we have as to custom, to which I will come shortly." (Tr. 1512)

On rebuttal, counsel for the appellee argued:

"The negligence as far as Baker Aircraft Sales is concerned, aside from the control tower operator, was that of Shima in taking off into the turbulent wake of this DC-8 in spite of the warning which was given, and which the evidence clearly establishes caused the accident—that is, the wake of the DC-8." (Tr. 1627)

Nor was anything said with respect to the theory of inadequate training of Shima in the oral decision of the Court at the close of the case on liability (Tr. 1639-1640).

Thus the theory that appellant Baker was negligent in failing to provide a properly trained instructor was injected into the case for the first time in the decision of the Court, some fourteen months after the trial. Nevertheless, having so injected the theory, the Court below, over objection, allowed an amendment to the complaint (without amending the pre-trial order) and denied a motion for a new trial, and refused to hear any further evidence. Rule 16 of the *Federal Rules of Civil Procedure* provides:

> "The Court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered, controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."
>
> Rule 16, *Federal Rules of Civil Procedure.*

Here, the binding nature of the pre-trial order was entirely disregarded and a new theory injected into the case and made the basis for the decision against the appellant Baker some fourteen months after trial and with no finding that it was necessary to prevent manifest injustice. Obviously the provisions of Rule 16 were simply thrust aside, and appellant Baker was

held liable on a new theory despite the evidence in the record of Shima's training, simply because the Court concluded without giving appellant Baker a chance to be heard and to introduce evidence thereon, including evidence of trade standards, that Shima must have been improperly trained because the accident happened. In *Clark v. United States,* 13 F.R.D. 342 (D.C. Oregon 1952) it is stated:

> "In the second phase of the order, the parties by succinct statement set up their theories of recovery and of defense. This is an extremely important function of the pre-trial order. The doctrine that there has to be a theory of the pleadings has been much criticized in the past. But, obviously enough, no lawyer can go into the trial of the case unless he has some theory of substantive law upon which he bases his right to recover. If it is improper to deduce this from the language of the pleading, it certainly is not improper for the party to set it out and be bound by his theories of recovery. If it is impossible for him to state a theory of recovery, then it might well be concluded that no such theory exists. It is unquestionably improper for the matter to lie at large and permit some court, whether trial or appellate, to pick the theory upon which the facts of the case should be decided, perhaps to the injustice of a litigant. Nor should either trial or appellate court assume that they are omniscient as to the causes of action which are set out by a complaint and that they may disregard the counsel's own theories of recovery.
>
> "When a plaintiff has by his counsel advised the Court and defendant of the theories upon which he relies and has given account of these,

then the Court should not adopt some other theory of recovery, even if it should be believed that such a theory was more applicable . . ." (page 345)

See also:

Phoenix Assurance Company of New York v. Latta, 373 P.2d 146 (Wyo. 1962);

Montgomery Ward & Co. v. Northern Pacific Terminal Company, 17 F.R.D. 52 (D.C. Oregon 1954) page 55;

Blanken v. Bechtel Properties, Inc., 194 F. Supp. 638 (D.C. D.C. 1961);

United States v. An Article of Drug, Etc., Acnotabs, 207 F.Supp. 758 (1962) at page 768.

As is stated in 3 Moore's Federal Practice (Second Edition), paragraph 16.20:

"As stated in the preceding section, the pre-trial order is ordinarily binding on the parties; if it were not, the pre-trial conference would lose much of its effectiveness. The court may, however, modify the order 'to prevent manifest injustice' . . ."

We submit, that based on the pre-trial order, the theory upon which the Court below relied was not available to it or to the plaintiff and that judgment therefore should have been entered for the defendant Baker. But even if after trial a new theory was to be inserted into the case, nevertheless, appellant Baker should have had a chance to introduce evidence thereon, compare *Bowles v. Wheeler,* 152 F.2d 34 (9th Cir. 1945).

Here, the very instructor from whom Mr. Shima had gotten his training was on the stand during the trial (Tr. 592) yet because the issue of whether or not Shima was adequately trained was not raised in the pre-trial order or in the trial of the case by anyone, including the Court, the examination of that witness on the subject of Mr. Shima's training was superficial. Moreover, since there were other flying schools in Hawaii (see Tr. 1433 et seq.), there obviously would have been available evidence as to custom and practice in the trade, and such evidence would have been relevant on the subject of whether or not Baker was at fault in failing more adequately to train Shima, see Restatement of Torts 2d, Section 295-A and the Reporter's comments thereon. See also 38 Am. Jur., Negligence, §317 and compare the annotation "Admissability, upon issue of negligence, of evidence of custom or practice of others" appearing in 137 A.L.R. page 611.

Appellant Baker had no notice that his issue was being tried and had no chance to defend in any manner. At the time of a motion for new trial as the transcript on that hearing shows, it made a strong and vigorous plea for an opportunity to present further evidence on this subject, which was denied by the Court below. Appellant Baker was thereby deprived of its day in court and of due process of law. It follows therefore, that even if the judgment cannot be reversed for the entry of judgment in favor of defendant Baker it should be reversed and a new trial on the issue of the negligence of defendant Baker on the theory found by the Court below ordered.

II. THE COURT ERRED IN HOLDING APPELLANT BAKER LIABLE BECAUSE, UNDER THE EVIDENCE, THE DECEDENT FURUMIZO WAS GUILTY OF CONTRIBUTORY NEGLIGENCE

(Specification of Error No. 6).

The evidence is clear that Furumizo had been instructed on the danger of wake turbulence (Tr. 568, 569, 571, 572, 580). The evidence is also clear that by custom and practice he would have been the person to have communicated with the tower, made the decision to take off and flown the plane (Tr. 567-8, 571-2, 580, 597-8, 632). If we are to ignore the Hawaiian precedent and to follow the Minnesota case of *Lange v. Nelson-Ryan Flight Service Inc.,* 259 Minn. 460, 108 N.W.2d 428, which held that the student pilot was not guilty of contributory negligence because no evidence thereof was introduced, then even so, custom may be used for the purpose of showing who was in the control of the plane and who made the decisions which led to the crash, *Whittemore v. Lockheed Aircraft Corporation,* 65 Cal.App.2d 737, 151 P.2d 670 (1944); *Underwriters v. Cherokee Laboratories, Inc.,* 288 F.2d 95 (10th Cir. 1951). With the evidence of custom and with the evidence of training, it follows that the decedent Furumizo was either guilty of contributory negligence or assumed the risk of his injury even under the rule in the *Lange* case, *supra,* because as is said in that case:

> "It is elementary that the defence of assumption of risk is properly submitted only *where there is evidence which would permit a finding that one so charged had knowledge of the particular risks; and comprehending and appreciating such risk, voluntarily took his chances of harm*

> *from that particular risk.* Technical progress in the art of flying has reached the point where an airplane cannot be regarded as a dangerous instrumentality, per se. Merely undertaking a flight in a modern aircraft, free from mechanical defects, where no dangerous condition known or reasonably to be apprehended or shown, does not provide a sufficient evidentory basis upon which to submit assumption of risk." (Italics supplied)

The instant case on the evidence is therefore clearly distinguishable from the *Lange* case since there was evidence of training with respect to wake turbulence and since there was evidence as to control of the aircraft based upon custom. Accordingly, even if the Court were unwilling to follow the Hawaiian precedent cited, it should have found in favor of defendant Baker, because the decedent Furumizo was guilty of contributory negligence or assumed the risk of his injury.

III. THE COURT BELOW AWARDED AN ERRONEOUS AND EXCESSIVE AMOUNT OF DAMAGES (Specification of Error No. 7).

As has been pointed out, the Court below promoted Mr. Furumizo posthumously from a GS-7 to a GS-9 in September of 1963, and from a GS-9 to a GS-11 in September of 1973. Under Hawaiian law the test for the measurement of future earnings is reasonable certainty, *Condron v. Harl,* 46 Hawaii 66 (1962) at 75. While the witness Olsen testified over objection that in his opinion the decedent Furumizo would have been promoted to GS-9 by September of 1963, based

upon the performance of others who were employed at the same time he was (Tr. 1688 and 1689), he had previously explained that such an opinion was based upon the assumption that Mr. Furumizo would have gone to the Oklahoma City Academy and passed the course there (Tr. 1681) and that his conclusion thereon might or might not be highly questionable. He had further testified that he could not say whether or not Furumizo would pass the course if he was sent to take it (Tr. 1672, 1674). This makes plain the fact that Furumizo was not reasonably certain of promotion to GS-9.

When we come to GS-11 the record is even stronger. Olsen, who was in charge of installation, the branch in which Furumizo worked, stated that there had been no promotions from GS-9 to GS-11 between the date of Furumizo's death and the date of the trial (Tr. 1691). He further testified that in order for him to give an opinion as to whether Furumizo would ever be promoted from GS-9 to GS-11 he would have to make certain assumptions of fact which are listed in the transcript at page 1694. As counsel for the appellee stated:

> "I am not asking him for the opinion because it is apparent there are too many assumptions involved, Your Honor." (Tr. 1695)

The witness Wong who worked in maintenance did give an opinion that Furumizo would eventually be promoted from GS-9 to GS-11 (Tr. 1761, 1762, and 1763). This, however, was based upon, among other things, a transfer from installation into maintenance

(Tr. 1776). We therefore are obviously dealing with a situation in which such a promotion is speculative. Even Counsel for the appellee admitted that in his brief on damages (R. 402-426) where he says at page 2:

> "Unfortunately, because of the uncertainties in forecasting the existence of vacancies, etc., Plaintiffs are not in a position to make any strong contention that the damages here should be based partially upon the GS-11 pay scale."

When the Court issued its decision fourteen months later it was not hampered by appellee's own admission that they were not in a position to make a strong argument for a promotion to GS-11. The Court promoted Mr. Furumizo to GS-11 in the face of the evidence and in defiance of Hawaiian law. It is appellant Baker's position that even the promotion to GS-9 was speculative and should not have been, under Hawaiian law, included in the damages, but certainly there can be no excuse for the inclusion of the promotion to GS-11.

A second point with respect to the damages for loss of future earnings is the fact that the Court below multiplied the earnings by a factor of 1.15865 to make up for the discount from the period from the date of death, June 20, 1960, to the day before the decision, June 20, 1965. However, the Court did not also multiply the deductions for pension contributions and income taxes on the same basis even though they were calculated and discounted on the same basis originally.

A final point in connection with the calculation of the worth of future earnings appears in the fact that the Court below calculated the decedent's personal expenses at 35% of salary after the deduction of pension plan payments and income taxes although, according to the testimony of the witness on the subject, Mrs. Furumizo, her calculation was based on 35% of the gross (Tr. 1936). It is to be noted that the Court gave the full earnings for the four years from June 20, 1961, to June 20, 1965, to the appellee but did not use her basis (35%) for deducting the decedent's personal expenses even in those years, let alone in any future years. This, we submit, was contrary to and unsupported by the evidence.

Finally, there is the matter of the $15,000 awarded for pain and suffering. As pointed out, the evidence indicates that the plane burst into flames practically instantaneously, and the pain and suffering, whatever it was, could not have had a duration of more than a few seconds. In the Court below the appellee had cited the cases of *Kimmel v. Solow,* 199 N.Y.S.2d 375 (Super. Ct. 1960) where an award of $5,000 was made, although there was nothing revealed about the cause of death or the duration of the suffering. In *Meehan v. Central Railroad Company of New Jersey,* 181 F.Supp. 594 (S.D. 1960), a train went into a river from an open drawbridge and the decedent drowned. A verdict of $10,000 for his pain and suffering was allowed to stand. In *Hickman v. Taylor,* 75 F.Supp. 528 (E.D. Pa. 1947), a seaman who was apparently asleep when the tug he was on sank, was awarded

$1,000 for pain and suffering. Comparison of cases is of course unsatisfactory as a basis for judging whether or not an award is too large or too small, but it is the only yardstick available. Here we know that death was practically instantaneous. Certainly it is plain that a death by drowning has a longer period of suffering than was encountered here. We submit that the award of $15,000 for the intense suffering of a few seconds duration in the light of all the other damages and in the light of the comparable cases, was excessive.

CONCLUSION

For the reasons stated above, the judgment below should be reversed or in the alternative, a new trial ordered, or alternatively the judgment should be remanded for further hearings and for amendment of the amount of damages.

Dated, Honolulu, Hawaii,
June 8, 1966.

Respectfully submitted,
FRANK D. PADGETT,
Attorney for Defendant-Appellant.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Frank D. Padgett.

(Appendix A Follows)

Appendix.

Appendix A

EXHIBITS

Transcript pages are used rather than record pages as the latter s not available to counsel)

Exhibit No.	Identified	Received
P-1	46	176
P-2-A	52	—
P-2-B	52	—
P-2-C	52	110
P-2-D	52	—
P-3	108	108
P-4	108	108
P-5	172	172
P-6	176	177
P-7	178	808; 813
P-8	178	—
P-9-A	181	—
P-9-B	181	—
P-10	182	182
P-11	183	183
P-12	183	—
P-13	184	184
P-14	186	186
P-15	187	187
P-16-A	By stip. 363	1197
P-16-B	By stip. 363	1197
P-16-C	By stip. 363	1197
P-16-D	By stip. 363	1197
P-16-E	By stip. 363	1197
P-16-F	By stip. 363	1197
P-16-G	By stip. 363	1197
P-16-H	By stip. 363	1197
P-16-I	363	1197
P-17-A	204	1197
P-17-B	204	1197
P-17-C	204	1197
P-18	207	207
P-19	207	1199
P-20-A	218	1504
P-20-B	218	1219
P-21	220	As G-12
P-22	220	As G-13
P-23	220	1009
P-24	220	1017
P-25	220	As G-14
P-26	220	1017
P-27	220	As G-15
P-28-A	479	778
P-28-B	479	778
P-28-C	479	778
P-29	481	778

Exhibit No.	Identified	Received
P-30	615	615
P-31	790	792
P-32	790	792
P-33	977	1200
P-34	1001	As B-3
P-35	1001	As B-2
P-36	Was G-4	1009
P-37	(1202	1217
P-37-B	(1202	1217
P-37-B	(1202	1217
P-38	1206	1217
P-39	1209	1218
P-40-A	1654	—
P-40-B	1654	—
P-40-C	1654	—
P-41	1715	1721
P-42	1715	1978
P-43	1715	—
P-44	1819	1819
P-45	1805	1805
P-46	1818	1818
P-47	1831	1839
P-48	1834	—
P-49	1873	1964
P-50	1873	1976
P-51	1873	1973
P-52	1898	1974
P-53	1921	—
P-54	1921	—
G-1	133	133
G-2	1253	1253
G-3	1253	1253
G-4	—	As P-36
G-5	—	1079
G-6	—	1079
G-7	501	—
G-8	577	583
G-9	577	—
G-10	590	591
G-11	885	1421
G-12	1027 (Was P-21)	1027
G-13	1027 (Was P-22)	1027
G-14	1027 (Was P-25)	1027
G-15	1027 (Was P-27)	1027
G-16-A	1455	1455
G-16-B	1455	1455
B-1	1451	1451
B-2	(Was P-35)	1454
B-3	(Was P-34)	1454
B-4	1954	—
B-5	1984	1984
B-6	1987	2004
B-7	2022	2025